UNIVERSITY OF TORONTO
FACULTY OF LAW

PROPERTY LAW
CASEBOOK VOL II

Professor Abraham Drassinower

Section I

2012-2013

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that to bring the right within the term 'easement' in the second section (of the Prescription Act) it must be one analogous to that of a right of way which precedes it and a right of watercourse which follows it, and must be a right of utility and benefit and not one of mere recreation and amusement."

The words which we have quoted were used in reference to a claim for a right to conduct horse races and, in our judgment, the formula adopted by Theobald should be read in the light of that circumstance. In any case, if the proposition be well founded, we do not think that the right to use a garden of the character with which we are concerned in this case can be called one of mere recreation and amusement, as those words were used by Martin B. No doubt a garden is a pleasure - on high authority, it is the purest of pleasures - but, in our judgment, it is not a right having no quality either of utility or benefit as those words should be understood. The right here in suit is, for reasons already given, one appurtenant to the surrounding houses as such, and constitutes a beneficial attribute of residence in a house as ordinarily understood. Its use for the purposes, not only of exercise and rest but also for such domestic purposes as were suggested in argument - for example, for taking out small children in perambulators or otherwise - is not fairly to be described as one of mere recreation or amusement, and is clearly beneficial to the premises to which it is attached. If Baron Martin's test is applied, the right in suit is, in point of utility, fairly analogous to a right of way passing over fields to, say, the railway station, which would be none the less a good right, even though it provided a longer route to the objective. We think, therefore, that the statement of Baron Martin must at least be confined to exclusion of rights to indulge in such recreations as were in question in the case before him, horse racing or perhaps playing games, and has no application to the facts of the present case.

For the reasons which we have stated, Danckwerts J. came, in our judgment, to a right conclusion in this case and, accordingly, the appeal must be dismissed.

NOTES

1) *Re Lonegren et al and Rueben et al* (1988), 50 D.L.R. (4th) 431 (B.C.C.A.) concerned the requirement that the dominant and servient tenement be owned by different persons. At the time of the creation of the easement one tenement was owned by Mr and Mrs Reuben as joint tenants, the other by Mr Reuben and another person as tenants in common. Successors-in-title to the servient tenement argued, unsuccessfully, that this was tantamount to there not being different owners of the two tenements. The trial judge had held that ownership was sufficiently separate, and the Court of Appeal agreed, although without reasons.

2) In *Ellenborough Park* the court asks whether the easement is "inconsistent with the proprietorship or possession of the alleged servient owners". What policy considerations inform this part of the test for an easement?

3) A owns a piece of waste ground, and agrees to sell half to Wal-Mart. Wal-Mart intends to use the land for a new store, and makes an agreement with A for the use of A's retained part of the waste ground as a parking lot. Over the next couple of years about 100 cars a day are

parked on A's land, the parked cars using about half of the area. A then sells to C, who tells Wal-Mart it cannot use the parking lot any longer. Wal-Mart claims it has an easement for parking. What arguments would you use on C's behalf?

NOTES:

(taken from Jim Phillips, *Property Casebook 2008-2009*)

1) Although it was not necessary to do so, Lederman J. went on to discuss whether a right of publicity/ right of action for appropriation of personality survived the death of the subject; that is, whether it descended to heirs. He held that it did, noting, inter alia, that "[t]he right of publicity ... protects the commercial value of a person's celebrity status. As such, it is a form of intangible property, akin to copyright or patent, that is descendible.... The right of publicity, being a form of intangible property ..., should descend to the celebrity's heirs. Reputation and fame can be a capital asset that one nurtures and may choose to exploit and it may have a value much greater than any tangible property. There is no reason why such an asset should not be devisable to heirs."

Lederman J. also dismissed the estate's second claim, that it held copyright in the conversations with Carroll. He stated that "for copyright to subsist in a work, it must be expressed in material form and have a more or less permanent endurance" and that "a person's oral statements in a speech, interview or conversation are not recognized in that form as literary creations and do not attract copyright protection".

An appeal to the Court of Appeal in Gould Estate was dismissed (unreported judgment, 1998, QL [1998] O.J. no 1894), but on the basis that Carroll owned copyright in the photographs, captions and text which appeared in the book.

2) The consequences of recognizing the same kind of personality right as the courts in the United States have been criticized in M.A. Flagg, "Star Crazy: Keeping the Right of Publicity Out of Canadian Law" (1999) 13 Intellectual Property Journal. There it is argued that the law favours "the rights of successful and well-known individuals over the rights of the public to depict, use, parody or honour many of the cultural icons of our time". Flagg suggests that the parameters of any publicity right should be legislated, because legislation would consider both the rights of creators with those of users and with Charter of Rights values such as freedom of expression and equality.

3) As may be inferred from Gould Estate, the common law does not generally recognise what we might call a 'right of privacy' in our personalities. There are exceptions, including section 5 of the Quebec Charter of Human Rights and Freedoms, which reads: "Every person has a right to respect for his private life". That section was applied in Aubry v. Editions Vice-Versa Inc [1998] 1 S.C.R. 591 Pascale Aubry brought an action against a photographer and a magazine for taking and publishing, without her consent, a picture of her sitting on the step of a building in downtown Montreal. The Supreme Court of Canada held that this was an infringement of the plaintiff's right to privacy under the Quebec Charter. The majority judgment of L'Heureux-Dube and Bastarache JJ. stated: "that right must include the ability to control the use made of one's image, since the right to one's image is based on the idea of individual autonomy". The right to privacy needed

to be balanced against "[t]the public's right to information" and against another person's right to freedom of expression. Thus there were circumstances in which a person lost control of the right to determine when his or her image was used; one obvious example was that of a public figure acting in the public domain, another was that of someone photographed as part of a crowd scene but who was not the subject of the photograph. But in this case those considerations did not apply, and the publishers were liable even in the absence of any defamation or other prejudice.

4) Some common law provinces have privacy Acts, which provide some protection. That of British Columbia (Privacy Act, R. S.B.C. 1996, c. 373) makes it a tort to "violate the privacy of another." It goes on to say that "The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, given due regard to the lawful interests of others." It also states, presumably in response to the problem of "papparazi" (of which I have little personal experience), that "privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass."

In a different section the BC Act codifies common law publicity rights, stating: "It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of ... property or services, unless that other ... consents to the use for that purpose." In Poirier v. Wal-Mart Canada Corp, [2006] Carswell BC 1876 (B.C.S.C.) the plaintiff was a store manager for Wal-mart who did consent to his name and photograph, accompanied by a welcoming message, to be used for the opening of a new Wal-mart store which he was going to be the manager of. But shortly thereafter he was dismissed for unacceptable accounting practices. Five weeks after his dismissal an extensive advertising campaign was run featuring him. The trial judge held that the dismissal "must surely be interpreted to cancel the consent previously provided." He distinguished a number of other cases, including Krouse, principally on the ground that in them the individual was not recognisable. Poirier was awarded $15,000 in compensation.